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No. 82-2085

# In the Supreme Court of the United States

OCTOBER TERM, 1983

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JOINT COUNCIL OF TEAMSTERS NO. 42, ET AL., PETITIONERS

*v.*

NATIONAL LABOR RELATIONS BOARD, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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**MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION**

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Petitioners contend that the National Labor Relations Board erred in concluding (a) that owner-operators of dump trucks who transport materials to and from construction job sites are independent contractors rather than employees, and (b) that their work is not covered by the construction industry proviso to Section 8(e) of the Act, 29 U.S.C. 158(e).

1. The Board concluded that petitioners violated Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), by "entering into, maintaining, and giving effect to" provisions of its Master Labor Agreement ("MLA") which required that the signatory contractors refrain from doing business with the dump truck owner-operators unless they complied with the terms of the MLA, including its union

membership provisions. In so concluding, the Board found that the owner-operators were independent contractors rather than "employees" within the meaning of Section 2(3) of the Act, 29 U.S.C. 152(3), and that the agreement was not privileged by the construction industry proviso to Section 8(e) because the work of transporting materials to and from the work site was not, in the language of the proviso, "done at the site of the construction" (Pet. App. 31-41, 43). The Board issued a cease and desist order, but denied the request of the owner-operators' trade association (a charging party) that the Board require petitioners to make owner-operators whole for losses incurred as a result of the maintenance of the unlawful provisions (Pet. App. 42 n.34).

The court of appeals upheld the Board's finding that petitioners had violated Section 8(e) and enforced its cease and desist order, but remanded to the Board "to fashion a make-whole remedy [for the owner-operators] or to show good cause why a make-whole remedy would not effectuate the purposes of the Act" (Pet. App. 13; footnotes omitted).

2. On July 1, 1982, petitioners filed a petition for a writ of certiorari (No. 82-3) contesting both the Board's unfair labor practice findings and the court of appeals' remand on the question of a make-whole remedy. The Board opposed the certiorari petition insofar as it challenged the finding of an unfair labor practice. 82-3 Br. in Opp. 6-8. As to the issue of the appropriate remedy, however, the Board suggested that the petition be held and disposed of in light of *Shepard* v. *NLRB*, No. 81-1627, in which the Court had granted certiorari to consider the propriety of the Board's denial of a make-whole remedy in essentially identical circumstances. 82-3 Br. in Opp. 8-9.

On January 18, 1983, this Court issued its decision in *Shepard* v. *NLRB*, sustaining the propriety of the Board's denial of a make-whole remedy. On February 22, 1983, the

Court granted the petition for a writ of certiorari in this case, vacated the judgment of the court of appeals, and remanded the case to the court of appeals "for further consideration in light of *Shepard* v. *NLRB*" (Pet. App. 3). On remand, the court of appeals amended its earlier opinion to conform to the holding in *Shepard* requiring deference to the Board's discretion to deny a reimbursement remedy, and it again enforced the Board's order (Pet. App. 1-2).

3. The instant petition for a writ of certiorari simply restates the contentions made in the petition in No. 82-3. It urges this Court to review the Board's determinations, upheld by the court of appeals, that the dump truck owner-operators are independent contractors rather than employees and that the transportation work involved here is not within the scope of the construction industry proviso to Section 8(e). For the reasons stated in our Brief in Opposition in No. 82-3, those issues do not warrant review by this Court.

As explained therein (82-3 Br. in Opp. 6), contrary to petitioners' assertion (Pet. 13-14), there is no conflict between the Ninth and District of Columbia Circuits regarding the status of owner-operators as independent contractors. The D.C. Circuit at one time sustained a decision by the Board that owner-operators are employees, *Joint Council of Teamsters No. 42* v. *NLRB*, 450 F.2d 1322, 1329 (1971). But the Board subsequently changed its view and concluded that owner-operators are independent contractors, and the D.C. Circuit sustained the Board's new position in the *Shepard* case itself. *Building Material & Dump Truck Drivers, Local 36*, 249 N.L.R.B. 386 (1980), enforced, 669 F.2d 759, 764-765 (1981), aff'd *sub nom. Shepard* v. *NLRB*, No. 81-1627 (Jan. 18, 1983). As further explained in response to the prior certiorari petition (82-3 Br. in Opp. 7-8), the courts of appeals have consistently upheld the Board's position that the type of transportation

work involved here is not within the construction industry proviso to Section 8(e), and the legislative history of Section 8(e) supports that position. See H.R. Conf. Rep. No. 1147, 86th Cong., 1st Sess. 39 (1959). Neither issue, therefore, warrants review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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